In the Court of Appeal

of the

State of California

FOURTH APPELLATE DISTRICT
DIVISION ONE

SAN DIEGANS FOR OPEN GOVERNMENT
Plaintiff and Appellant
v.
SAN DIEGO STATE UNIVERSITY RESEARCH FOUNDATION, *et al.*
Defendants and Respondents

INVESTIGATIVE NEWSOURCE, *et al.*
Real Parties in Interest and Respondents

REVIEW OF ORDER FROM THE SAN DIEGO SUPERIOR COURT
HONORABLE EDDIE C. STURGEON, TEL: (619) 450-7067
Case No. 37-2015-00011951-CU-MC-CTL

BRIEF OF REAL PARTIES IN INTEREST AND RESPONDENTS INVESTIGATIVE NEWSOURCE AND LORETTA HEARN

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number: D069189
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APPELLANT/PETITIONER: San Diegans for Open Government RESPONDENT/REAL PARTY IN INTEREST: SDSU Research Foundation, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Investigative Newsource and Loretta Hearn

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: May 13, 2016

Valerie E. Alter
(TYPE OR PRINT NAME)

▶ Valerie E Alter
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Superior Court properly struck all of Plaintiff San Diegans For Open Government's (**SDOG**) claims against Investigative Newsource (***inewsource***) and its editor, Loretta Hearn (**Hearn**) (collectively ***inewsource***), pursuant to the anti-SLAPP statute. Cal. Code Civ. Proc. § 425.16. SDOG's claims fall within the first prong of the anti-SLAPP statute, which considers "whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67. Similarly, SDOG's claims fail the second prong of the anti-SLAPP statute, which requires SDOG to demonstrate a probability of success on its claims. *Id.* at 67.

As to prong one, SDOG's lawsuit arises out of protected First Amendment activities. SDOG seeks to invalidate the contracts memorializing the news partnership between *inewsource* and San Diego's public radio and television station (**KPBS**), pursuant to which *inewsource* and KPBS jointly produce and report the news. Newsgathering and news reporting are undeniably protected by the First Amendment. SDOG further complains about *inewsource*'s use of trademarks belonging to KPBS and San Diego State University (**SDSU**), of which KPBS is a department. However, *inewsource* only uses KPBS's and SDSU's trademarks in

promoting news stories created jointly by it and KPBS, and their news partnership, which again is protected First Amendment activity.

SDOG cannot avoid this conclusion by presenting its claims as high-level and abstract challenges to the mere "negotiation and execution" of agreements – ***and not the protected First Amendment activity underlying those agreements*** – because to do so ignores the factual basis of SDOG's claims and the context and terms of the contracts it challenges. SDOG's claims for violation of California Government Code Sections 1090 and 8314 contend that certain agreements between *inewsource* and KPBS were not supported by sufficient consideration, but the challenged consideration was access to news reporters and delivery of news content. Similarly, SDOG's claim for derivative trademark infringement arises out of *inewsource*'s use of KPBS's and SDSU's trademarks to credit KPBS for its work on joint news stories and to promote their news partnership. Thus, it is clear that protected activity forms the basis of each of SDOG's claims.

The narrow public interest exception to the anti-SLAPP statute (contained in Code Civ. Proc. § 425.17 subd. (b)) is similarly inapposite because the exception to that exception, Section 425.17 subdivision (d), applies. Subdivision (d) is to be construed broadly like the anti-SLAPP statute itself, and applies where a claim is brought against (1) a journalist based on her "gathering, receiving, or processing of information for communication to the public," or (2) any person "based upon the creation,

dissemination, exhibition, advertisement, or other similar promotion of any ... television program, or an article published in a newspaper or magazine of general circulation." Subdivision (d) applies for the same reasons that the anti-SLAPP statute applies in the first instance. Namely, SDOG complains about *inewsource*'s news partnership with KPBS, which is the means by which the two organizations jointly create, disseminate, exhibit, advertise, and promote their news content. Moreover, SDOG explicitly complains about *inewsource*'s use of KPBS's and SDSU's trademarks to promote their jointly created news content and news partnership.

That SDOG's claims arise out of *inewsource*'s newsgathering and news reporting is even clearer when one considers the timeline leading up to SDOG's filing of its Complaint. The evidence shows SDOG filed this lawsuit only after *inewsource* published a series of unflattering articles about the questionable business practices of SDOG's alter ego, Briggs Law Corporation (**BLC**) and its principal Cory Briggs (**Briggs**). Before the lawsuit was ever available from the court's docket or served however, Briggs attempted to stir up negative publicity about it to smear *inewsource*. Briggs and his significant other also made meritless retraction demands, and SDOG, via BLC, served a subpoena on *inewsource* in another case (where *inewsource* is not a party) to obtain information about a February 26, 2015 story called "Briggs opposes San Diego City Attorney's move to unseal transcript" – which concerned the sealed deposition testimony from

Briggs's significant other about whether she was really married to Briggs, as grant deeds to their property claimed, but which she denied under oath. (Appellant's Appendix ("AA") volume I, page 233 at [¶24]; AA III 551-726; Notice of Lodgment ("NOL") Exhibit 23.) SDOG served *inewsource* with this lawsuit only after it refused to retract its stories about Briggs, asserted its reporter's privilege in the face of SDOG's subpoena, and continued to publish unflattering stories about SDOG and Briggs. Thus, it could not be clearer that *inewsource*'s reporting is the "but for" cause of this retaliatory lawsuit, and all of the claims fall within prong one of the anti-SLAPP statute.

SDOG's claims similarly fail prong two. SDOG asserted claims for violation of Government Code Sections 1090 and 8314 and a claim for trademark infringement against *inewsource,* which *inewsource's* undisputed evidence eviscerated. In response, SDOG relied only on its Complaint and exhibits thereto, which is insufficient as a matter of law to defeat an anti-SLAPP motion. More specifically, in connection with the Section 1090 claims, *inewsource* presented evidence that Hearn had no influence whatsoever on the negotiations between *inewsource* and KPBS, which SDOG admits is essential to a Section 1090 claim. SDOG produced no evidence to the contrary. Similarly, *inewsource* presented evidence that Hearn made no improper personal use of government property – the *sine qua non* of a Section 8314 claim – and SDOG again presented no evidence

to the contrary. Finally, *inewsource* presented evidence that *inewsource* used KPBS's and SDSU's trademarks with permission, and legal authorities confirm its use to identify news content jointly produced by those entities is not actionable as a matter of law. Again, SDOG had no evidence to the contrary and no answer to *inewsource's* legal arguments. Thus, the Superior Court properly determined SDOG "did not meet its burden of showing by competent and admissible evidence that it has a probability of prevailing on the merits of its claim," and struck the Complaint.

II. STATEMENT OF FACTS AND OF THE CASE

A. *inewsource*

inewsource is an independent, nonprofit journalism entity, specializing in in-depth, data-driven stories about governmental action and public accounting. It has won many awards for its reporting. For example, it won five national awards for "An Impossible Choice," an in-depth examination of life support issues. (AA I 228 [¶4]; AA II 282-355.)

B. The Partnership Between *inewsource* And KPBS

inewsource partners with KPBS, which is a department of SDSU, to produce investigative news stories. (AA I 228 [¶5]; AA II 365-403.) In its university setting, *inewsource* also works to teach, train, and mentor journalism students. (*Id.*)

inewsource began working informally with KPBS in 2010 to air some of its early news stories. The partnership between *inewsource* and KPBS started to solidify when *inewsource*'s data reporter began working with reporters at KPBS. (AA I 229 [¶6].) The most high-profile joint project completed early in their relationship was a study of the resurgence of whooping cough, which had reached epidemic proportions in 2010. *inewsource* reporters and its data expert teamed up with a reporter for KPBS to investigate who was getting sick and why. This project aired on KPBS radio, online, and as a TV documentary in December 2010, and was published on the Internet. (*Id.* [¶7]; AA II 359-362; NOL Exhibit 2; AA I 98-214.)

inewsource and KPBS formalized their partnership in the fall of 2011. (AA I 229 [¶8]; AA II 365-370.) KPBS was finishing a new newsroom and beginning a nightly television news show, and it wanted more content, particularly investigative reporting, for its many platforms. (*Id.* [¶9].) At the same time, *inewsource* was looking for a respected, reliable audience for its burgeoning investigative news content. (*Id.* [¶10].) As part of their more formal arrangement, KPBS agreed to give *inewsource* space in its newsroom, so that *inewsource* staff could be close to KPBS staff for purposes of collaboration. In exchange, *inewsource* agreed to give KPBS all of its news stories for distribution on radio, TV, and the web, and its reporters to report them. (*Id.* [¶11].)

The parties executed an agreement in 2012 (the **2012 Agreement**). (AA I 229 [¶11]; AA II 365-370.) In 2015, they updated the lease arrangement that they had begun in 2011 (the **2015 Lease**) and extended the 2012 Agreement (the **2015 Extension**). (*Id.*[¶12]; AA II 373-403.) In each of those agreements, Hearn, *inewsource*'s executive director and editor, negotiated on behalf of *inewsource* alone. Deanna Mackey, KPBS station manager, and Suzanne Marmion, director of news and editorial strategy, who have no financial interest in *inewsource*, negotiated on behalf of KPBS. (AA I 229-230 [¶¶11-12]; AA II 243 [¶¶11-12].) Hearn did not negotiate on behalf of KPBS and had no role whatsoever – much less authority, decision making power, or influence – on the KPBS side of the negotiations. (*Id.*; AA I 240 [¶7]; AA I 243 [¶11].)

Moreover, the agreements themselves make clear they were made pursuant to a partnership between *inewsource* and KPBS for newsgathering and reporting. (AA I 231 [¶13]; AA II 365-403.) For example, the 2012 Agreement, renewed in 2015, provides that *inewsource*, in exchange for office space, will provide KPBS with:

- "Ten substantial data driven stories which include an Investigative Newsource interactive tool using data to allow the audience to dig deeper into the story";
- "One Watchdog feature per month to include a print version; [*inewsource*] reporters will be available as reasonably requested (subject to professional commitments) by KPBS for broadcast coverage; feature content shall be agreed upon in advance with the KPBS Director of News and Editorial Strategy;" and

- "Weekly data brief on a topic of interest to KPBS' audience; such data brief content shall be agreed upon in advance with the KPBS Director of News and Editorial Strategy."

(AA I [¶ 14]; AA II 365-370; AA I 98-214.) The 2012 Agreement further provides that *inewsource* "reporters will be available as reasonably requested (subject to professional commitments) by KPBS for broadcast coverage which could include features, packages, debriefs, and other programs." (*Id.*)

The 2015 Lease similarly makes clear that *inewsource* and KPBS entered into a partnership for the purposes of newsgathering and reporting. It specifically states, "SDSURF/KPBS shall lease office space (Exhibit A attached) for [*inewsource*] based reporters to use to create investigative news content." (AA I 231[¶15]; AA II 373-383; AA I 98-214.)

C. *inewsource* And KPBS's Joint Reporting

Since formalizing their partnership in 2011, *inewsource* and KPBS have jointly created and distributed more than 285 stories. (AA I 231 [¶16]; AA I 98-214.) Practically, there are three ways in which they generate joint news stories.

First, in most cases, *inewsource* reporters do the reporting, with input from KPBS editors, such as with "An Impossible Choice." Similarly, an investigation into San Diego attorney Cory Briggs, SDOG's alter ego, was completed by *inewsource* reporters, with assistance from a KPBS videographer. "Money, Power and Transit: An investigation," an

investigation into the North County Transit District, was reported and produced by *inewsource* with camera and studio support from KPBS. (AA I 232 [¶17]; AA II 412-442; *see also* Section II, D, 2, *infra*.)

Second, in some cases, KPBS reporters do the reporting, and Hearn, as *inewsource*'s editor, is primarily responsible for editing. For example, Hearn edited a March 24, 2014 story called "Balboa Park Centennial Committee Members Apologize For Failure" written by KPBS reporter Angela Carone, as well as a November 6, 2014 story called "Justice Elusive in San Diego State Sexual Assault Case." (*Id.* [¶18]; AA II 445-471.)

Finally, KPBS and *inewsource* reporters jointly report certain stories. For example, the whooping cough investigation was a collaboration between then-KPBS reporter Joanne Faryon and *inewsource* data specialist Kevin Crowe. (AA I 232 [¶19]; AA II 359-361.)

In all cases, *inewsource* works closely with KPBS editors and producers on specific content for the KPBS platforms. This includes appearances on KPBS's Evening Edition, Midday Edition, and Roundtable, and the "joint investigations desk" page on the KPBS website. (AA I 231-233 [¶¶16, 20]; AA II 406.) Moreover, *inewsource* and KPBS jointly promote the stories that are jointly authored, produced, and/or distributed, and, pursuant to the agreement between them, use one another's trademarks. (AA II 365-370 [co-attribution requirement for news stories].)

inewsource does not use any marks belonging to KPBS or SDSU other than to promote their shared content and partnership. (AA I 233 [¶21].)

D. *inewsource*'s Reporting On Attorney Briggs, Followed By His Acts Of Retaliation, Including This Meritless Suit

1. *inewsource's* Reporting On Attorney Briggs And His Retaliation

inewsource published a series of unflattering stories about Briggs and his questionable practices, beginning on February 23, 2015, with a story called "Cory Briggs' land deals raise ethical, legal questions." (AA I 233 [¶22]; AA II 493-497; AA I 98-214.) After more than a dozen stories about Briggs and his escapades, including one questioning the legitimacy of SDOG and Briggs's other "non-profits," on April 9, 2015, SDOG – which *inewsource* has reported is controlled by Briggs – filed this lawsuit. (AA I 233 [¶23]; AA I 246, *passim; see* Sections II, D, 2 and III, E, 4, b, *infra*.)

But even before the complaint was available from the court or served on Hearn or *inewsource*, Briggs, SDOG's alter ego, tried to drum up media interest in it to portray *inewsource* and Hearn in a negative light. (AA I 233-234 [¶¶23, 26]; AA I 255 [¶6], Section II, D, 2, *infra*.) Briggs, and his significant other, Sarichia Cacciatore, additionally wrote meritless retraction demands in response to *inewsource*'s stories. (*Id*.; AA II 512-548.) SDOG, through its counsel, BLC, also served a subpoena on *inewsource* in another case filed by SDOG (to which *inewsource* is not a party) seeking information related to an *inewsource* story called "Briggs

opposes San Diego City Attorney's move to unseal transcript." (AA I 233 [¶24]; AA III 551-726; AA II 500-502; AA III 820-832.) SDOG withdrew the subpoena only in the face of *inewsource's* motion to quash it, asserting the reporter's privilege. SDOG still did not serve *inewsource* with the lawsuit. (AA I 225 [¶4]; AA III 739.)

Hearn and *inewsource* were finally served with this meritless lawsuit on June 22, 2015, only after continued reporting on Briggs and SDOG. (AA I 234 [¶25].) For example, one May 28, 2015 story titled, "Briggs-associated nonprofits flout state, federal laws," devoted significant attention to Plaintiff SDOG, noting:

> • "The San Diego City Attorney's Office is currently trying to persuade a judge in Superior Court that one of Briggs' most litigious nonprofits, San Diegans for Open Government, is a 'mere alter ego' of its counsel."
>
> • "According to depositions and other court filings, Briggs and his firm hold and maintain all the group's corporate records; file and pay for its lawsuits, its annual registration fees and filings with the state and federal governments; control its Facebook and Twitter accounts; and collect all settlements and judgments when the group prevails in court."
>
> • "Briggs Law Corp. has represented the nonprofit in every court case it has filed with the exception of a suit against *inewsource* [this lawsuit], filed less than two months after its series on Briggs began."

(*Id.*; AA II 505-509; AA I 255 [¶7], Section II, D, 2, *infra*.) Briggs' "wife" (Cacciatore) also demanded documentation of *inewsource*'s § 501(c)(3) nonprofit status. (AA I 235[¶26(iv)]; AA III 729-736.) Another of his non-profits also demanded a retraction. (AA II 223-234.) As Briggs' conduct

shows, this meritless lawsuit complaining about *inewsource*'s newsgathering and reporting partnership with KPBS is merely an attempt by Briggs through his alter ego SDOG to silence unwanted press about him. (AA I 234 [¶26].)

2. SDOG Is The Alter Ego Of Briggs and His Law Corporation

Not coincidentally, Plaintiff SDOG is the alter ego of Briggs Law Corporation (BLC), *i.e.*, Briggs (*see* Section III, E, 4, c, *infra*; AA VI 1413 - 1416). Substantial evidence establishes this fact:

- For example, BLC employees incorporated SDOG's predecessor (AA IV 972-973; AA VI 1548-1589), and provided its sole address and staff until the City raised this defense in *SDOC v. City of San Diego*, Case No. 37-2013-00052721-CU-MC-CTL (AA IV 1053-1092, 1095-1104; AA V 1189-1210; AA VI 1548-1589; AA IV 899-900; AA V 1293-1300; AA V 1133-1136, 1142, 1155-1161); SDOG has three "appointed" "board" members, two of whom vote on decisions and the third is Briggs' cousin, and none of them have any real knowledge of SDOG's operations (AA V 1205-1206, 1290 [89:16-17], 1305 [139:13-24], 1135-1136 [65-66:13-2, 13-22]; AA IV 877-878 [20-21:24-2, 7-12]; AA IV 899-902.)
- SDOG exists to file lawsuits, all of which – up until this one against *inewsource* – used BLC as its counsel, and it has no procedure to hire other counsel (AA V 1137 [71:12-22], 1138, [73:14-18], 1142, 1155-1156; AA IV 982-988; AA IV 881 [33:9-18], 887 [67:19-22], 905-906, 912-913; AA IV 940-964, 996-1023, 1118; AA V 1337-1636); this suit uses a Briggs compatriot, in an attempt to circumvent the anti-SLAPP statute (AA I 255 [¶4], AA III 752-818);
- SDOG has no bank account (AA V 1375, 1283-1284, 1288-1290 [84-85,89: 22-2, 16-17]), claims to receive no income so lacks any funds of its own, even to pay small court costs (*id.*; AA V 1301 [117: 16-21], 1302 [120:19-25], 1134 [64:8-15], 1139 [74:15-22], 1238-1250), and uses BLC to pay its fees (AA IV 992-

993; AA V 1163-1165 [146, 148-149: 8-16,7-4]) and to collect its settlements (AA V 1166 [153:20-24]; AA IV 1005-1045); while a letter from SDOG "members" claims BLC is "reimbursed" for its fees when SDOG is successful (AA IV 1118-1121), a settling defendant or judgment debtor pays BLC directly (*id.*; AA V 1163-1168);

- SDOG does not comply with the corporate formalities required by federal and state law for 501(c)(3) organizations, including failing to maintain corporate minutes (AA IV 879-880, 914 [396:6-9], 1098; AA V 1134, 1169), to elect officers (AA V 1283; AA IV 878-879; AA V 1135-1136 [65-66: 13-2, 13-22]), have a quorum at meetings (AA IV 881 [33:9-18]; AA V 1148- 1149 [97-98:23-9], 1300-1301), create an annual report (IV AA 901-902), record votes (AA V 1150 [104:6-12], 1152 [106:1-15]; IV AA 914 [396: 6-9]) or have membership criteria (AA V 1140-1141; AA IV 980); a BLC attorney attends every SDOG meeting but BLC has no members in SDOG (AA IV 880-883; AA V 1133, 1294) and BLC handles all of SDOG's matters of corporate health, governance operations and organizational status (AA VI 1527-1607, AA IV 899-901; AA V 1142, 1157-1161; AA IV 889-891); BLC is SDOG's agent for service of process (AA V 1193-1194);

- SDOG lacks procedures necessary to ensure its activities focus on charitable efforts (AA IV 903-904, 1048-1050; AA VI 1548-1589) and instead has put BLC in charge of its daily operations, and so it only files lawsuits (*id.*, AA IV 889 [73:9-20], AA IV 899 [125:6-17]; AA V 1142 [85:9-11]);

- BLC possesses all SDOG documents (AA IV 899; AA V 1304), and controls SDOG's social media accounts (AA IV 905-906, 912-913; AA V 1238-1250) and vets all of its communications (*id.*; AA V 1146);

- Briggs' cousin (AA V 1290) is SDOG's Treasurer (AA V 1287 [59:21-23]) and works in the same building as Briggs' Upland office (AA V 1282 [13:12-14]), but has no connection to San Diego, has never been to an SDOG meeting, and claims no knowledge of its operations (AA V 1293-96), nor has she ever voted on SDOG matters (AA V 1296, *passim*; AA IV 878, AA V 1161-1162, 1197-1210, 1234-1236); and

- SDOG has no real educational program (AA V 1286 [27: 20-21], 1304) other than serving as a suspiciously secretive

plaintiff claiming to seek "open government" (despite articles of incorporation which state its purpose is "environmental" (AA IV 967-969, AA V 1153) and trumpeting stories about its lawsuits in social media (AA IV 905-906, 912-913).

E. SDOG's Meritless Claims

The crux of SDOG's Complaint is that the agreements between *inewsource* and KPBS – pursuant to which they partnered to investigate and deliver the news – violate California's prohibitions on self-dealing and use of public funds for private benefit. Gov't Code §§ 1090, 8314. For example, paragraph 18(A), which is pled only on information and belief, alleges that the 2012 Agreement violated section 1090 because Hearn negotiated on behalf of KPBS and had a financial interest in the contract. Paragraph 22(A) makes identical allegations – again, only on information and belief – with regard to the 2015 Lease. These allegations are baseless. As noted above, Hearn had no influence over the KPBS side of the negotiations, and there is no evidence to the contrary. (AA I 229-230 [¶¶11,12].)

Paragraphs 29(A) and 29(C), also pled on information and belief, allege Hearn used her position as a "lecturer" teaching a single class at SDSU to secure the agreements at issue and derived some unidentified personal benefit. This borders on ridiculous, as a "lecturer" within the CSU system is a temporary, non-tenure-track position. (AA I 230 [¶12].) The agreements pertain to a partnership between *inewsource* and KPBS for the

distribution of content, and Hearn receives no personal benefit. (AA I 236-237 [¶31].) Again, there is no evidence to the contrary.

Finally, SDOG alleges that *inewsource* infringed KPBS's and SDSU's trademarks because it used those marks without permission and without compensating KPBS or SDSU. This, too, is false. *inewsource*'s only use of the marks was to promote its news partnership with KPBS and the content created pursuant thereto. (*See* Section II, B, C, *supra*.) Such uses were mandated by the parties' agreements and KPBS and SDSU received sufficient consideration for them.

F. The Anti-SLAPP Motions

In response to SDOG's attempt to use the judicial process to silence *inewsource* and KPBS, all defendants filed anti-SLAPP motions. (AA I 72-264; AA II 265-548; AA III 549-832; AA IV 833-1121; AA V 1122-1380; AA VI 1381-1655.) They argued that SDOG's claims attack the partnership between them for the gathering and reporting of the news – activities protected by the First Amendment – and thus fall within the anti-SLAPP statute. (AA I 87-90.) They also presented admissible evidence establishing that SDOG's claims were meritless, if not frivolous. (AA I 90-95.)

In response, SDOG ***did not introduce any admissible evidence to the contrary***, choosing instead to rely solely on its Complaint, which alone was sufficient to justify striking the Complaint. (AA VII–IX 1671-2186,

passim; AA IX 2201-2204, Respondents' Joint Supplemental Appendix ("RJSA") I 3-11.) SDOG failed to establish that its claims arose from something other than the partnership between *inewsource* and KPBS and acts undertaken in support thereof, pursuant to which *inewsource* and KPBS carry out their First Amendment-protected activities, or that its claims were likely to success on their merits. (*Id.*) The Superior Court thus correctly granted *inewsource* and KPBS's motions. (RJSA I 62-63)

G. The Court's Order Granting The Anti-SLAPP Motions

The Superior Court correctly found with regard to the first prong of anti-SLAPP statute – whether the complaint arises out of protected activity – that "[t]he defendants have submitted undisputed evidence that this action arises from protected activity under C.C.P. § 425.16. As set forth in the undisputed declarations and exhibits, the contracts at issue are inextricably related to news gathering and dissemination, which is clearly protected activity under Section 425.16." (RJSA I 62.) With regard to the second prong of an anti-SLAPP motion, which considers the merit of a plaintiff's claims, the Superior Court, apparently crediting *inewsource*'s evidentiary objections, held, "Plaintiff did not meet its burden of showing by competent and admissible evidence that it has a probability of prevailing on the merits of its claim." (*Id.*) The Superior Court further rejected SDOG's claim that its Complaint fell within the public interest exception to the anti-SLAPP statute contained in section 425.16(b) because:

> The claims in this case are based upon contracts to investigate and report on the news, which is specifically exempted from Section 425.17(b). (*See* C.C.P. § 425.17(d); *see also Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal.App.4th 1050, 1067-68.) Specifically, Section 425.17, subdivision (d) makes it clear that Section 425.17, subdivision (b) does not apply to a person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service; and does not apply to an action that is based upon the "creation" or "dissemination" of "any dramatic, literary, musical, political, or artistic work ...." (C.C.P. § 425.17(d)(1)(2).) While subdivision (b) is to be construed narrowly, subdivision (d) is to be construed broadly. (*See Major v. Silna* (2005) 134 Cal.App.4th 1485, 1495.) Because the contracts between KPBS and inewsource to investigate and report on the news fall within these broadly enumerated categories, the claims in this case are exempt from the application of Section 425.17(b).

(RJSA I 63.) SDOG appealed.

III. ARGUMENT

A. Standard Of Review

inewsource concurs that review of the Superior Court's Order is *de novo*.

B. The Standard Applicable To Anti-SLAPP Motions

The anti-SLAPP statute "shall be construed broadly." Code Civ. Proc. § 425.16, subd. (a). It provides that any

> cause of action against a person arising from any act of that person in furtherance of that person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Id. § 425.16(b)(1). An "act in furtherance of a person's right of petition or free speech" includes "any ... conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." *Id.* § 425.16(e).

To determine whether Section 425.16 applies, a court must undertake a two-step process. Code Civ. Proc. § 425.16(b); *Varian Med. Sys., Inc. v. Delfino* (2005) 35 Cal.4th 180, 192. First, "the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67. Second, if the statute applies, the burden shifts to the plaintiff to demonstrate a probability of success on its claims. *Equilon*, 29 Cal.4th at 67; Code Civ. Proc. § 425.16(b)(1). To meet that burden, a plaintiff must demonstrate that the complaint is legally sufficient and supported by facts sufficient to sustain a favorable judgment if the evidence submitted by him is credited. *Seelig v. Infinity Broad. Corp.* (2002) 97 Cal. App. 4th 798, 809. This showing must be made by admissible evidence, and the standard applied to the evidence is the same as that used in determining motions for directed verdict or summary judgment. *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15. The motion must be granted "if the evidence introduced either negates or fails to reveal the actual existence of a triable claim ...." *Id.*

Where a plaintiff asserts its claims are exempt from the anti-SLAPP statute based on the public interest exception (Code Civ. Proc. § 425.17(b)), the court addresses that issue first, "prior to examining the applicability of section 425.16." *The Inland Oversight Committee v. Colonies Partners, L.P.* (2015) 239 Cal. App. 4th 671, 675. *inewsource* thus first addresses SDOG's contention that Section 425.17 subdivision (c) bars application of the anti-SLAPP statute.

C. The Public Interest Exception In Section 425.17 Does Not Apply

1. Section 425.17 Subdivision (d) Bars Application Of The Public Interest Exception

SDOG contends the anti-SLAPP statute does not apply because it meets the requirements of the public interest exception thereto, contained in Section 425.17(b). However, as the Superior Court correctly held, the exception to the exception contained in Section 425.17(d) applies here.

Section 425.17 subdivision (b) provides:

> (d) Subdivisions (b) and (c) do not apply to any of the following:
>
> (1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.
>
> (2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture

> or television program, or an article published in a newspaper or magazine of general circulation.

Code Civ. Proc. §§ 425.17(d)(1), (2). Section 425.17(b)'s public interest exception is to be "construed narrowly," and Section 425.17(d), the exception to the exception, is to be construed broadly like anti-SLAPP statute itself. *See Major v. Silna* (2005) 134 Cal. App. 4th 1485, 1495. Properly construed, both Section 425.17(d)(1) and 425.17(d)(2) apply here.

a. <u>Section 425.17 Subdivision (d)(1) Applies Here</u>

Subdivision (d)(1) applies to "[a]ny person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution." Section 2 of Article I of the California Constitution, in turn, enumerates the following people: "A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service. ... " Cal. Const. Art. 1, § 2(b); Cal. Evid. Code § 1070 (same). *inewsource*, a news reporting organization, and Hearn, a reporter and editor, both clearly fall within the enumerated terms.[1] Moreover, SDOG's claims arise out of *inewsource*'s newsgathering partnership with KPBS, pursuant to which it "gather[s],

[1] SDOG admits this. (Appellant's Brief ("AB") at 15 ["Appellant is not a news service indirectly seeking to gain any competitive advantage against either Ms. Hearn or Investigative Newsource."].)

receive[s], or provide[s] information for communication to the public," and thus falls within Section 425.17 subdivision (d)(1).

SDOG contends this subsection does not apply because it applies to news personnel "while engaged in the gathering, receiving, or processing of information for communication to the public," and attempts to distinguish *Ingels v. Westwood One Broadcasting Services, Inc.* (2005) 129 Cal. App. 4th 1050, 1067-68, upon which the Superior Court relied, on its facts. (AB 9-10.) *inewsource* does not dispute that Section 425.17(d)(1) applies "when the underlying act relates to news gathering and reporting to the public with respect to the news media. ... " (*Ingels*, 129 Cal. App. 4th at 1067.) Rather, this dispute centers around whether SDOG's claims arise out of *inewsource*'s newsgathering and reporting activities, as *inewsource* contends, or the mere execution of a contract, as SDOG contends. SDOG's position makes sense only if one views its claims in a narrow vacuum that the law does not sanction.

SDOG's Complaint attacks the partnership between *inewsource* and KPBS, alleging that two agreements – the 2012 Agreement and the 2015 Lease – and *inewsource*'s conduct pursuant thereto, violate California's prohibitions against self-dealing. Those contracts dictate the process pursuant to which *inewsource* and KPBS jointly engage in newsgathering and reporting activities. For example, the 2014 Agreement requires *inewsource* to deliver to KPBS specific news stories and to make its

reporters available to KPBS for to report them to the public. (AA I 231[¶14]; AA II 365-370.) Similarly, the 2015 Lease notes that KPBS is leasing space to *inewsource* for its "reporters to use to create investigative news content." (AA I 231 [¶15]; AA II 373-383.)

SDOG contends that none of this matters because it "is suing over Ms. Hearn's use of her influence as a public employee to negotiate a contract favorable for the private organization she has a personal interest in ***before*** any news-related function began." (AB at 10.) SDOG does not support this argument with any evidence, nor can it, because it is wrong. *inewsource* began working informally with KPBS in 2010, and they formalized their partnership in 2011. (AA I 229 [¶6].) They executed the 2012 Agreement and subsequently the 2015 Lease and 2015 Extension against the backdrop of their existing newsgathering and reporting relationship. (AA I 229-230 [¶¶ 8-12]; AA II 365-404.) Thus, the ongoing newsgathering and news reporting relationship between *inewsource* and KPBS must be considered in evaluating SDOG's claims arising out of the contracts between them.

The paramount importance of this newsgathering and reporting relationship is clear when the allegations in the Complaint are examined as a whole. SDOG focuses on its claims for violation of Government Code Section 1090, and describes them with a high level of abstraction, to the exclusion of allegations directly implicating newsgathering and reporting.

Moreover, SDOG completely ignores its claims for violation of Government Code Section 8314 and trademark infringement. However, the law is clear that courts independently determine applicability of the anti-SLAPP statute, and its concomitant exceptions, based on the ***facts*** underlying each cause of action. *City of Colton v. Singletary* (2012) 206 Cal. App. 4th 751, 768. Thus, applying the correct analysis, it is clear that each of SDOG's claims arises out of protected activity.

First, SDOG's Section 1090 claims assert that the agreements between *inewsource* and KPBS are illegal because KPBS received insufficient consideration for them. (AA I 12-14 [¶¶18(B), 22(B)].) The challenged consideration to KPBS consists of *inewsource*'s delivery of the news and access to reporters. (Section II, B, C, *supra*.) Thus, even with regard to the Section 1090 claims, "the underlying act" on its face "relates to news gathering and reporting to the public with respect to the news media .... " (*Ingels*, 129 Cal. App. 4th at 1067.)

The same is true of SDOG's complaint about *inewsource*'s use of KPBS's and SDSU's trademarks. (AA I 14-15[¶26].) *inewsource* ***only*** uses SDSU's or KPBS's trademarks in connection with contractually required promotion of their news partnership and attribution of their joint content. (AA II 365-370.) This claim, therefore, arises out of *inewsource*'s "gathering, receiving, or processing of information for communication to

the public," such that Section 425.17(d)(1)'s exemption to the public interest exemption contained in Section 425.17 (b) applies.

Finally, SDOG's Complaint contends on information and belief that Hearn made improper use of public resources, without elaboration or explanation, in violation of Government Code Section 8314. (AA I 15-16 [¶29].) As best as can be discerned, this claim is another riff on SDOG's insufficient consideration argument. Thus, as with the Section 1090 claims, this claim directly implicates the sufficiency of *inewsource*'s provision of news stories, reporters, and other newsgathering services in exchange for office space, and the Superior Court correctly determined that it falls within Section 425.17 subdivision (d). (Section II, B, C, *supra*.)

b. <u>Section 425.17 Subdivision (d)(2) Also Applies Here</u>

SDOG fares no better under Section 425.17 subdivision (d)(2). Its legislative history confirms that the public interest exception was not intended to apply to partnerships like that between *inewsource* and KPBS:

> Proposed subdivision (d) of newly added Section 425.17 would exempt the news media ... from the bill ***when the underlying act relates to news gathering and reporting*** to the public with respect to the news media or to activities involving the creation or dissemination of any works of a motion picture or television studio. For claims arising from these activities, the current SLAPP motion would remain available to these defendants."

Ingels, 129 Cal. App. 4th at 1067-68 (quoting Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003–2004 Reg. Sess.) as amended May 1, 2003, p. 14 and emphasis added).

SDOG's Complaint, for the reasons explained in connection with Section 425.17(d)(1), is clearly based on *inewsource*'s newsgathering and news reporting partnership with KPBS, pursuant to which they are jointly responsible for the "creation, dissemination, exhibition, advertisement, or other similar promotion of ... a ... television program, or an article published in a newspaper or magazine of general circulation." The Complaint thus falls within Section 425.17(d)(2).

SDOG's claim that Section 425.17(d)(1) does not apply because "the Agreements at issue here would be equally illegal if Ms. Hearn were a construction magnate and she used her faculty position at SDSU to procure a long-term construction contract between SDSU and her construction company" is built on a false assumption, *i.e.*, that analysis of a construction contract would be identical to that required here. (AB 11.) Presumably, the allegedly inadequate consideration for a long-term construction contract between a fictional construction firm owned by Hearn and SDSU would not be the delivery of news stories and access to reporters. Moreover, in bringing such a claim, SDOG would not likely attack the use of trademarks in connection with the reporting and promotion of the news. While SDOG may be correct that Section 425.17 subdivision (d) would not apply were its

Complaint based on a construction contract, that is not the case that SDOG brought.

2. No Claims Other Than Malicious Prosecution Are Categorically Exempt From The Anti-SLAPP Statute

SDOG contends that Section 425.17 subdivision (b) applies here because "[t]he anti-SLAPP statute should not even be applied to lawsuits rooted in generally applicable conflict-of-interest laws and prohibitions against the waste of public resources by public employees," and accordingly, *inewsource* should not get "special treatment" because of its media identity. (AB 11-12.) Plaintiffs do not cite a single case limiting the anti-SLAPP statute in this respect because their argument is contrary to well-settled precedent.

The plain language of the anti-SLAPP statute provides, "[a] cause of action against a person arising from any act of that person in furtherance of that person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike .... " Code Civ. Proc. § 425.16(b)(1). It provides no exception for any law, much less that advocated by SDOG here. "Nothing in the statute itself categorically excludes any particular type of action from its operation, and no court has the 'power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.'" *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 92, quoting *California Teachers*

Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal. 4th 627, 633. California courts have long applied the anti-SLAPP statute to "generally applicable" laws. In fact, in a case decided a mere two days after SDOG filed its Opening Brief, this very Court applied the anti-SLAPP statute to a claim for violation of Section 1090. *Sweetwater Union High School Dist. v. Gilbane Building Co.* (February 24, 2016) 245 Cal. App. 4th 19, 42-43. This Court affirmed the denial of the anti-SLAPP motion because the plaintiff established a likelihood of prevailing on the merits, not because section 1090 claims are exempt from the anti-SLAPP statute. *Id.* at 51. Thus, the anti-SLAPP statute is plainly applicable here.

SDOG's citation to *Cohen v. Cowles Media Co.* (1991) 501 U.S. 663 and *Marin Indep. Journal v. Municipal Ct.* (1993) 12 Cal. App. 4th 1712, 1721- 1722 does not change this conclusion. (AB 12.) Those cases do not address the anti-SLAPP statute, but rather held that "the publisher of a newspaper has no ***special immunity*** from the application of general laws" based on the First Amendment itself. *Cohen*, 501 U.S. at 670 (emphasis added). The anti-SLAPP statute does not give special immunity, to the media or to anyone else.[2] On the contrary, it provides that, where a claim

[2] Even if the anti-SLAPP statute conferred broad immunity on the press, SDOG cites no authority that would prevent the California Legislature from enacting such a law. In fact, the California Legislature has enacted broad immunity to "generally applicable" laws for constitutionally protected speech and petitioning activity. Civ. Code section 47, subd. (b) ("A

against "***any person***" arises out of that person's exercise of his right of free speech, the plaintiff must establish that his claims have merit. This statute was carefully crafted legislative balance to combat "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Code Civ. Proc. § 425.16, subd. (a). This is exactly that paradigmatic case – SDOG retaliates against *inewsource* for its unflattering articles against Briggs – and the anti-SLAPP statute applies.

3. SDOG Has Not Met Its Burden Of Establishing That The Public Interest Exception Applies

Moreover, irrespective of Section 425.17(d), SDOG has not met ***its burden*** of establishing that the "public interest" exception applies. SDOG, as the proponent of the "public interest" exception, bears the burden of proving it applies because, "[o]ne claiming an exemption from a general statute has the burden of proving that he comes within the exemption." *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal. 4th 12, 22 (considering the "commercial speech" exception in Section 425.17(c).)

In order to establish that Section 425.17(b) applies, SDOG must prove that it (1) "does not seek any relief greater than, or different from, the

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privileged publication or broadcast is one made ... (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law. ...")

relief sought for the general public," (2) "[t]he action, if successful, would enforce an important right affecting the public interest, and would conference a significant benefit ... on the general public," and (3) "[p]rivate enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter." Code Civ. Proc. § 425.17, subd. (b). SDOG can establish none of these factors here because this action, while giving the illusion of being brought on behalf of the public, is, in reality, brought to silence *inewsource*'s unflattering reporting about Briggs. (Section II, A-D, *supra*.)

The evidence that *inewsource* presented below – which SDOG ***made no attempt whatsoever to rebut*** – proves that this lawsuit is anything but an altruistic attempt by SDOG to protect the public. This lawsuit must be viewed in the context of (1) a continuing series of unflattering stories about SDOG's alter ego, Briggs (AA I 233-234 [¶¶23, 25]; AA I 246-264, *passim*), (2) Briggs' meritless retraction demands (AA I 234-235[¶26]; AA I 255 [¶6]; AA II 512-548), (3) SDOG and Brigg's failed attempt to break *inewsource*'s reporters privilege (AA I 233 [¶24]; AA II 500-502, AA III 551-727, 820-832), (4) a demand for documentation of *inewsource*'s § 501(c)(3) nonprofit status, and (5) Briggs's shopping of disingenuous allegations about condo ownership in the complaint – which SDOG had to concede were irrelevant in this lawsuit – before the complaint was ever publicly available or served. (AA I 233[¶23]; AA I 235 [¶26(iv)]; AA III

729-736; AA VI 1660-1663). Against this backdrop, it is clear this lawsuit is not brought in the public interest, but rather to silence *inewsource*'s negative coverage of Briggs.

D. SDOG's Entire Complaint Is Subject To The Anti-SLAPP Statute

Given that the public interest exception to the anti-SLAPP statute does not apply, the next step is to determine whether the anti-SLAPP statute applies. It is clear it does, for many of the same reasons that Section 425.17, subdivision (d) applies. Namely, SDOG's meritless claims arise directly out of *inewsource*'s newsgathering and reporting activities in connection with matters of public interest, as the trial court correctly found.

To determine whether a claim "arises from protected activity" and thus falls within the anti-SLAPP statute, courts "disregard the labeling of the claim" and instead consider the "allegedly wrongful and injury producing conduct ... that provides the foundation for the claim." *Hunter v. CBS, Inc.* (2013) 221 Cal. App. 4th 1510, 1520. As the California Supreme Court has explained,

> conduct alleged to constitute breach of contract may also come within constitutionally protected [activities]. The focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning .... [T]he Legislature recognized that 'all kinds of claims could achieve the objective of a SLAPP suite – to interfere with and burden the defendant's exercise of his or her rights. Considering the purpose of the [anti-SLAPP] provision, expressly stated, the nature or form of the action is

> not what is critical but rather that it is against a person who has exercised certain rights.

(*Navellier*, 29 Cal.4th at 92.)

Applying that standard, it is clear SDOG's entire complaint arises out of conduct undertaken by *inewsource* "(1) in furtherance of the right of free speech, and (2) in connection with a public issue or issue of public interest."

1. ***inewsource*'s Partnership With KPBS And SDSU Involves Free Speech And Conduct In Furtherance Of The Right Of Free Speech**

News reporting itself is a form of free speech subject to the anti-SLAPP statute. *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal. App. 4th 156, 163 ("[r]eporting the news is speech subject to the protections of the First Amendment and subject to a motion brought under section 425.16, if the report concerns a public issue or an issue of public interest.") *See also Braun v. Chronicle Publishing Co.* (1997) 52 Cal. App. 4th 1036, 1046 ("news reporting activity *is* free speech.").

"An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right." *Hunter*, 221 Cal. App. 4th at 152 (quoting *Tamkin v. CBS Broadcasting, Inc.* (2011) 193 Cal.App. 4th 133, 143). Conduct in furtherance of the right to free speech is broadly defined: "the conduct need only help to advance or assist a person in the exercise of his free speech rights." *Collier v. Harris* (2015)

240 Cal. App. 4th 41, 46 (holding that registering domain names constitutes conduct in furtherance of the right to free speech). As the court recognized in *Collier*, "Distributing the flyer or mailer constitutes speech, but the speech could not occur without first printing the flyer or mailer." *Id.* at 53.

The boundaries of conduct in furtherance of the right to free speech are equally broad in the context of news reporting. It is undebatable that newsgathering is conduct in furtherance of news reporting, which, as noted above, is protected speech. *Hunter*, 221 Cal. App. 4th at 152. *See also Lieberman*, 110 Cal. App. 4th at 163 ("Reporting the news usually requires the assistance of newsgathering, which therefore can be construed as undertaken *in furtherance* of the news media's right to free speech"). "[W]here ... an action directly targets the way a content provider chooses to deliver, present, or publish news content on matters of public interest, that action is based on conduct in furtherance of free speech rights and must withstand scrutiny under California's anti-SLAPP statute." *Greater Los Angeles Agency on Deafness, Inc. v. Cable News Network, Inc.* (9th Cir. 2014) 742 F.3d 414, 425 (***GLAD***). This protection extends to all aspects of the newsgathering and reporting processes, including, for example, hiring and partnership decisions. *Hunter*, 221 Cal. App. 4th at 152 (holding that "CBS's selections of its KCBS and KCAL weather anchors .... were essentially casting decisions regarding who was to report the news on a

local television newscast" that "helped advance or assist" CBS's news reporting, and thus fell within the scope of the statute).

Moreover, "implicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees* (1984) 468 U.S. 609, 622. "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *NAACP v. Patterson* (1958) 357 U.S. 449, 460. Associations for the purpose of disseminating or enhancing a certain message have long been entitled to the full weight of protections afforded by the First Amendment. *Boy Scouts of America v. Dale* (2000) 120 S.Ct. 2446, 2454-2456; *NAACP,* 357 U.S. at 460. Thus, an action targeting the association of two entities for purposes of furthering their First Amendment rights also falls within the anti-SLAPP statute.

SDOG's Complaint attacks the partnership between *inewsource* and KPBS, alleging that two agreements – the 2012 Agreement and the 2015 Lease – and *inewsource*'s conduct pursuant thereto violate California's prohibitions against self-dealing. *inewsource*'s decision to partner with KPBS is indistinguishable from the decision to hire a particular weather anchor, which was held to fall within the anti-SLAPP statute in *Hunter.* 221 Cal. App. 4th at 152.

An examination of the partnership between *inewsource* and KPBS reinforces that SDOG's Complaint arises out of protected activity. The 2014 Agreement about which SDOG complains requires *inewsource* to deliver to KPBS specific news stories and to make its reporters available to KPBS for coverage. (AA I 231[¶14]; AA II 365-370.) Similarly, the 2015 Lease, about which SDOG also complains, notes that KPBS is leasing space to *inewsource* for its "reporters to use to create investigative news content." (AA I 231 [¶15]; AA II 373-383.) Thus, there can be no doubt that SDOG complains about the way in which *inewsource* has chosen to partner with KPBS to deliver the news and to gather it, both of which are protected activities.

SDOG contends that the anti-SLAPP statute does not apply because its Complaint is allegedly "based on are the negotiation and execution of agreements by Respondents in violation of Government Code Sections 1090 and 8314 and the California Constitution," and not protected activity. (AB at 21 [emphasis removed].) SDOG's argument is a gross oversimplification of its Complaint and ignores that it is not seeking to void a contract for widgets. SDOG is seeking to void a contract pursuant to which people in San Diego receive the news, and its claims cannot be divorced from the subject matter of the contracts at issue.

The analysis might be different if SDOG sought to void a non-existent and fictional construction contract between a construction company

owned by Hearn and SDSU or a non-existent and fictional contract between a bookkeeping firm owned by Hearn and SDSU, or any number of other hypothetical factual scenarios that would not require the Court to consider constitutionally protected news reporting and newsgathering. (AB 21-22.) Similarly, the analysis in *Hunter* might have been different if it involved the hiring of a butcher instead of the hiring of a television news weather anchor. But this case, like *Hunter*, involves protected newsgathering and news reporting. Hearn is not a construction magnate nor does she own a bookkeeping business. She is a journalist, as are her reporters that report their news stories on KPBS, and the contracts that SDOG challenges relate to and require the Court to pass on the legality of the process pursuant to which *inewsource* and KPBS deliver and gather the news.

SDOG's high-level focus on "the negotiation and execution" of agreements in connection with its 1090 and 8314 claims ignores the factual basis of those claims, and its remaining claim, all of which expressly rely on news reporting and newsgathering activities. (AB 21-22.)[3] As explained in Section III, E, 1, *supra*, and restated briefly here, SDOG first ignores that its Section 1090 claims assert that delivery of news stories and

[3] As noted in Section III, E, 1, *supra*, a court must determine the applicability of the anti-SLAPP statute to each cause of action separately where causes of action have different factual predicates. *City of Colton*, 206 Cal. App. 4th at 768. SDOG, however, improperly lumps its entire Complaint into a 30,000 foot description of its Section 1090 claim.

access to reports was insufficient consideration for the contracts between *inewsource* and KPBS. (AA I 231 [¶¶14-15]; AA II 365-370, 373-383; AA I 98-214.) SDOG additionally ignores that it contends that *inewsource* infringes KPBS's and SDSU's trademarks (AA I 234-235[¶26]), but that *inewsource* ***only*** uses those marks in connection with contractually required attribution of joint content and promotion of the partnership. (AA II 365-370.) Finally, SDOG ignores that its Section 8314 claim again appears to depend on the sufficiency of the consideration provided by *inewsource*, *i.e.*, the news stories and access to reporters. (AA I 235-236 [¶29].) Thus, it is clear that protected activity forms the basis of, and is not merely incidental to, each of SDOG's claims, and the anti-SLAPP statute applies. *GLAAD*, 742 F.3d at 425 ("where ... an action directly targets the way a content provider chooses to deliver … news content," the anti-SLAPP statute applies).

SDOG's argument that "[b]ut for Defendants' contracting in violation of Government Code Sections 1090 and 8314 and the California Constitution, this action never would have been brought" does not change this conclusion. (AB 22.) In essence, SDOG contends that the anti-SLAPP statute does not apply because *inewsource* violated the law. This argument, however, impermissibly "confuses the threshold question of whether the SLAPP statute applies with the question whether [the plaintiff] has

established a probability of success on the merits," and cannot defeat the applicability of the anti-SLAPP statute. *Hunter*, 221 Cal. App. 4th at 1526.

SDOG's claim that the anti-SLAPP statute does not apply because *inewsource* allegedly engaged in "illegal activity" is similarly unavailing. (AB 22-23.) The "illegal activity" exception to the anti-SLAPP statute is a high bar. Generally, "[a]ny claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case." *Collier*, 240 Cal. App. 4th at 54 (quoting *Navellier*, 29 Cal. 4th at 94). "The ***lone exception*** to this rule occurs when the defendant concedes or the evidence conclusively establishes the defendant's conduct is illegal as a matter of law." *Id.* (emphasis added). Moreover, the illegal activity exception "may be applied only when 'the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal *as a matter of law*." *Id.* at 55 (quoting *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320).[4] *inewsource* did not admit its conduct was illegal – as it was not – and ***SDOG did not submit any evidence*** to prove that *inewsource*'s conduct was illegal as a matter of law. (AA, *passim*.) On the contrary, as discussed in detail below, SDOG submitted ***no evidence*** and

cannot even meet its lesser burden to establish a likelihood of prevailing on the merits. Thus, the illegal activity exception to the anti-SLAPP statute does not apply, the anti-SLAPP statute does apply, and the Superior Court's order should be affirmed.

2. The Partnership Also Relates To Matters of Public Interest

"[T]he proper inquiry" when determining whether conduct meets the public interest requirement is "whether such conduct was 'in connection with' a matter of public interest." *Hunter*, 221 Cal. App. 4th at 1527. "Public interest" within the meaning of the anti-SLAPP statute "shall be construed broadly." *Tamkin*, 193 Cal.App. 4th at 144. Consistent with this, courts have held that "[m]ajor societal ills are issues of public interest," as is criminal activity or even something as mundane as the weather. *Lieberman*, 110 Cal. App. 4th at 160; *Hunter*, 221 Cal. App. 4th at 1527; *GLAD*, 742 F.3d at 422 (holding CNN's reporting is of public interest).

inewsource's reporting on topics like governmental action, public accounting, public health, and conflicts of interest like Briggs caused the City to suffer are clearly within this broad definition of public interest. *inewsource*'s partnership with KPBS, pursuant to which it gathers and

[4] A media partnership between *inewsource* and KPBS can hardly be analogized to money laundering, bribery, or extortion. (AB 23.)

reports news on these and other topics, relates to a matter of public interest.[5] (*See* Section II, A-D, *supra*.) SDOG's complaint therefore falls squarely within the scope of the anti-SLAPP statute, and the Superior Court's order should be affirmed.[6]

E. The Lower Court Correctly Held That SDOG Failed To Establish A Likelihood Of Success On The Merits

1. SDOG's First And Second Claims For Violation Of Government Code Section 1090 Fail Because There Was No Evidence Of Self-Dealing

"The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality." *Lexin v. Sup. Ct.* (2010) 47 Cal. 4th 1050; California Attorney General's Conflicts of Interest Guide at 64, available at http://ag.ca.gov/publications/coi.pdf (**AG Guide**) ("Section 1090 essentially prohibits a public official from being financially interested

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[5] *See, e.g., Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal. App. 4th 39 ("matters of health ... are undeniably" of public interest to the public); *Thomas v. City of Beaverton* (9th Cir. 2004) 379 F.3d 802, 809 ("Unlawful conduct by a government employee or illegal activity within a government agency is … of public concern."); *Johnson v. Multnomah Cty.* (9th Cir. 1995) 48 F.3d 420, 425 ("misuse of public funds, wastefulness, and inefficiency in … operating government entities are … of inherent public concern.").

[6] SDOG does not address the public interest prong of the anti-SLAPP analysis in its brief on appeal, nor did it address the issue below. SDOG has thus conceded that the public interest requirement is met.

in a contract in both the official's public and private capacities.") Thus, "the test" for bringing a transaction within the scope of Gov. Code § 1090 "is whether the officer or employee participated in the making of the contract in his official capacity" and simultaneously had a private financial interest in it, thereby standing on both sides of the challenged agreement. *Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 236-37.

SDOG claims that the 2012 Agreement and the 2015 Lease violated section 1090 and seeks to invalidate those agreements, claiming Hearn negotiated on both sides of the deal. (AA I 12-14 [¶¶18(A), 22(A)].) The lower court correctly rejected SDOG's claims because it cannot prove these allegations, which are ***pled only on information and belief and unsupported by any evidence.*** (AA, *passim*.) As the evidence proved, Hearn engaged in an arms-length negotiation *with* KPBS as an individual acting on behalf of *inewsource*. She did not negotiate *on behalf of* KPBS and had no role whatsoever – much less authority, decision making power, or influence – on behalf of KPBS. (AA I 235-236 [¶¶ 29-30]; s*ee also* AA I 240 [¶7]; AA I 243 [¶11].) Thus, there can be no violation of section 1090, and the Superior Court properly struck SDOG's first and second claims. *See*, *e.g.*, 80 Ops.Cal.Atty.Gen. 41 (1997) (firefighters may sell a fire mask to their fire department without running afoul of section 1090

where "They will have no input, as employees, into the city's decision whether to make the purchase."); *cf.* AG Guide at 65 (same).

SDOG contends that it has nonetheless established a likelihood of success the merits of its claim because the critical question is "the extent to which" a public employee "influences an agency's contracting decisions," and "the question of whether Ms. Hearn exerted a level of influence in a capacity that demands public trust is a factual question that cannot be definitively resolved at this early stage." (AB at 26.) However, the ***undisputed evidence*** established Hearn had no role whatsoever, and ***no authority, decision making power, or influence*** on either KPBS's or SDSU's decision to contract with *inewsource*. (AA I 235-236 [¶¶29-30]; s*ee also* AA I 240 [¶7]; AA I 243 [¶11].) SDOG presented no evidence to the contrary. Thus, there can be no disputed issue of material fact, and the Superior Court properly struck SDOG's Section 1090 claim. *See*, *e.g.*, *Stenehjem v. Sareen* (2014) 226 Cal. App. 4th 1405, 1422 n. 13 ("Because no evidence was submitted on behalf of Stenehjem regarding the prelitigation communications between the parties, the facts are undisputed for purposes of evaluating the motion."); *Mission Springs Water Dist. v. Verjil* (2013) 218 Cal. App. 4th 892, 918 ("At least for purposes of the SLAPP motion, this does not present a factual issue, because the Proponents have not presented any contrary evidence.")

SDOG contends it submitted sufficient evidence to support its claims, relying on its "verified" Complaint and exhibits thereto for the proposition that Hearn was a "Journalist in Residence" and was a lecturer (not even a professor, much less a tenured professor) at SDSU. (AB at 26-27.) Even ignoring that much of SDOG's "verified" Complaint was pled on information and belief, SDOG cannot rely on a complaint, verified or not, to meet its burden of establishing that it will prevail on the merits. *See*, *e.g.*, *Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 109 ("The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence." (quoting *Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017)); *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal. App. 4th 450, 474 (same).

Moreover, admissibility aside, SDOG's purported evidence of Hearn's role as a lecturer has nothing to do with Hearn's authority, decision making power, or influence over the negotiations at issue. Hearn's lecturer position cannot itself create an inference of authority. Were it otherwise, the mere fact that a defendant is a public employee – regardless of his or her role, job description, or actions taken – would be sufficient to create a triable issue of fact and thus to propel a Section 1090 claim to trial. Such an interpretation is clearly wrong because it would write the requirement that a public employee defendant's "official capacities carry the potential to

exert influence over the contracting decisions of a public agency" out of Section 1090. *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 111.[7] Thus, here, where the only evidence shows that Hearn ***did not*** have influence over KPBS's contracting decision, Hearn's mere position as a journalist in residence and lecturer at SDSU was insufficient to create a triable issue, and the Superior Court properly struck SDOG's 1090 claims.

2. SDOG's Third Claim For "Misappropriation And Use Of Intellectual-Property Rights" Fails Because There Was No Evidence To Support It

SDOG attempted to bring what appears to be a derivative claim for trademark infringement, styled "Misappropriation And Use Of Intellectual-Property Rights," asserting that *inewsource* "misappropriated" SDSU's and KPBS's trademarks without "written authorization." (AA I 15[¶26(a)].)

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[7] Even in *Hub City*, upon which SDOG relies extensively, the Court did not "infer[] from the circumstances" a violation of Section 1090 based solely on the fact that the defendant was a public employee. Rather, the court relied on independent evidence that the defendant stood on both sides of the transaction and influenced the negotiations. The Court explained, "As its private manager, Aloyan had a unique understanding of Compton's in-house waste management system. He influenced staffing decisions and negotiated to acquire equipment and property. Aloyan was still in his official capacity when he proposed a waste management franchise to Adams, and continued in that capacity as he negotiated the franchise agreement with Compton and prepared the city's in-house waste division for the franchise's implementation." 186 Cal.App.4th at 1127. The court thus concluded that "[t]he evidence reasonably supports the conclusion that Aloyan leveraged his public position for access to city officials and influenced them for his pecuniary benefit." *Id.*

SDOG's claim fails because (1) the undisputed evidence flatly contradicts it, (2) it lacks a legal basis, and (3) SDOG lacks standing to bring such a claim.

First, as to the facts, the 2012 Agreement, which was renewed in 2015, provides that the parties will "engage in joint fundraising activities" and that "[e]ach of KPBS and IN shall receive clear co-attribution with respect to all Joint Materials ...." (AA II 365-370.) In other words, *inewsource* and KPBS were ***contractually required*** to fundraise jointly and to identify one another on jointly produced content, which necessitated *inewsource*'s use of KPBS's and SDSU's trademarks. It is impossible to fulfill these obligations without identifying KPBS and SDSU.

SDOG contends that "[t]he evidence shows that Investigative Newsource has used the 'SDSU' and 'KPBS' trademarks in describing those entities as 'partners' of Investigative Newsource and on Investigative Newsource job announcements" without permission and without compensating SDSU or KPBS. (AB 30.)[8] SDOG's argument completely ignores the terms of the 2012 Agreement, described above, which require joint attribution and promotion.

[8] SDOG, again, improperly relies on its Complaint and inadmissible declaration of its attorney in support of its Opposition. It proffered no evidence in this regard and its argument fails for this reason alone.

Second, even assuming *arguendo* that the 2012 Agreement did not give *inewsource* explicit permission to use the trademarks in the complained-of manner, SDOG's argument incorrectly assumes that compensation would be due in the first instance. Trademark protection does not extend to the use of a mark to describe its source:

> Indeed, it is often virtually impossible to refer to a particular product for purposes of comparison, criticism, point of reference or any other such purpose without using the mark. For example, reference to a large automobile manufacturer based in Michigan would not differentiate among the Big Three; reference to a large Japanese manufacturer of home electronics would narrow the field to a dozen or more companies. Much useful social and commercial discourse would be all but impossible if speakers were under threat of an infringement lawsuit every time they made reference to a person, company or product by using its trademark.

New Kids on the Block v. News America Pub., Inc. (9th Cir. 2002) 971 F.2d 302, 306-07. As a result, "[c]ases like these are best understood as involving a non-trademark use of a mark - a use to which the infringement laws simply do not apply." *Id.* at 307. This is such a case. As a result, the trademark laws do not apply to the ***only uses*** *inewsource* ever made of KPBS or SDSU's trademarks, pursuant to which *inewsource* identified KPBS as its news partner and properly attributed joint works. (AA I 233 [¶21].) Thus, *inewsource* is not, as a matter of law, obligated to compensate either KPBS or SDSU for the use of their trademarks.

Furthermore, even assuming that compensation for the complained-of uses was required, SDOG also incorrectly assumes that SDSU and KPBS

received nothing for the use of their trademarks. On the contrary, as explained in Section II, A-D, *supra*, there was ample consideration – *i.e.*, compensation – for the alleged use of KPBS's and SDSU's trademarks. *inewsource*, as part of its partnership with KPBS, has delivered to KPBS more than 285 stories and made its reporters available to KPBS to report news. (AA I 231 [¶¶14, 16]; AA II 365-370.) This is more than sufficient consideration, and confers a huge benefit to taxpayers and the public at large.

Finally, even if the facts or the law supported a derivative claim for trademark infringement here, SDOG lacks standing as a non-owner to assert such a claim. *See*, *e.g.*, *Herb Reed Enters., LLC v. Fla. Entm't Mgmt.* (9th Cir. 2014) 736 F.3d 1239, 1247 (a plaintiff must establish that it is "the owner of a valid, protectable mark"). In response, SDOG contends that it has standing to bring its this claim under Code of Civil Procedure Section 526a, which permits taxpayers to "obtain a judgment, restraining and preventing any ***illegal expenditure*** of ... funds, or other property of a county, town, city or city and county of the state. ..." (AB at 31 (emphasis altered)) However, SDOG provides no authority permitting a non-trademark owner to use Section 526a to state a claim for trademark infringement. The lack of authority is unsurprising, as alleged trademark infringement simply does not constitute an "illegal expenditure" of public funds, which is the hallmark of a Section 526a claim. *Thompson v.*

Petaluma Police Department (2014) 231 Cal.App.4th 101, 105-06 (a claim brought pursuant to Section 526 must allege illegal activity or government waste, which is "a useless expenditure of public funds that is incapable of achieving the ostensible goal"); *McLeod v. Vista Unified School Dist.* (2008) 158 Cal.App.4th 1156, 1165 (Section 526a claim "must involve an actual or threatened expenditure of public funds").[9] Thus, the Superior Court's Order holding that SDOG failed to establish a likelihood of success on its claim for "Misappropriation And Use Of Intellectual-Property Rights" must be affirmed.

3. SDOG's Fourth Claim For Violation Of Government Code Section 8314 Fails Because There Was No Evidence Of Misuse Of Public Property

Government Code section 8314 makes it "unlawful for any elected state or local officer ... to use or permit others to use of public resources for a campaign activity, or personal or other purposes which are not authorized by law." Gov. Code § 8314. The statute excludes "incidental and minimal use of public resources, such as equipment or office space" from its definition of prohibited "personal purposes," and only bars the "use of

[9] Section 526a also cannot apply to *inewsource* because *inewsource* is not a governmental agent, nor acting on behalf of the government, as Section 526a requires. Cal. Code Civ. Proc. Section 526a ("An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or

public resources which is substantial enough to result in a gain or advantage to the user or a loss to the state or any local agency for which a monetary value may be estimated." *DiQuisto v. Cnty. of Santa Clara* (2010) 181 Cal.App.4th 236, 268-69 (emphasis added). Thus, to bring a claim within the scope of § 8314, the plaintiff must show (1) a use of public resources that is (2) "substantial enough" to result in a benefit or loss of estimable monetary value. *Id.* at 274-75. The Superior Court properly struck SDOG's Section 8314 claim because SDOG did not even come close to meeting its burden, as it produced no evidence.

SDOG's Complaint alleges, again on information and belief, that Hearn derived some undefined personal benefit from the 2012 Agreement and 2015 Lease. (AA I 15-16 [¶¶29(A), (C)].) However, the agreements about which SDOG complains were negotiated at arms-length and pertain to the partnership between *inewsource* and KPBS. Hearn receives no personal benefit from these agreements, and makes no improper use of public resources pursuant thereto. (AA I 236-237 [¶31].) Moreover, at the time the 2012 Agreement was negotiated, Hearn was not even being paid by SDSU, and clearly falls outside the scope of the statute. (*Id.,* AA I 229 [¶11].) Thus, SDOG's claim fails and must be stricken.

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city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf .... ").

SDOG devotes a ***single sentence*** in the main text of its brief and one footnote to this claim. It states in the main text, "Ms. Hearn's procurement of the use of SDSU's resources, as set forth in the 2012 and 2014 Agreements, is adequate to substantiate a violation of Section 8314's prohibition on the use of public resources for private use, without fair value being paid to SDSU." (AB 29-30). In the footnote, it contends that the $1 payment provided for in the 2015 Lease is insufficient. (AB at 30.) SDOG's arguments, however, do not address the primary issue in a Section 8314 claim – a "***personal***" use public resources – and the only admissible evidence makes clear that no such use occurred, which alone defeats its claim. (AA I 236-237 [¶31].) Moreover, SDOG presents no authority other than its own *ipse dixit* to contend SDSU did not receive sufficient consideration for the 2015 Lease. In connection with the 2015 Lease and 2015 Extension – which must be considered together – *inewsource* was obligated to provide news stories to KPBS and to make its reporters available to report news. (AA I 231 [¶14].) This is more than sufficient consideration, and SDOG presents no authority or evidence otherwise. (AA, *passim*.) Thus, SDOG failed to prove a likelihood of success on the merits of its 8314 claim, and this Court should affirm the Order striking it.

4. <u>SDOG Lacks The Ability To Maintain This Lawsuit</u>

a. <u>This Suit Exceeds SDOG's Corporate Purpose</u>

A corporate or nonprofit "[p]laintiff's right [to sue] ... is to be measured by the powers possessed by it at the time the action was commenced." *Boca & L.R. Co. v. Sierra Valleys Ry. Co.* (1905) 2 Cal. App. 546, 556. SDOG's articles of incorporation show it was created for "***environmental***" purposes, not to file a meritless challenge to a news partnership to silence news reporting. (AA IV 967-969; AA V 1153 [emphasis added].) SDOG therefore cannot maintain this lawsuit as it exceeds its corporate purpose. *Id.*

SDOG's llth hour amendment of its articles of incorporation to broaden its "purpose" in the face of this anti-SLAPP motion cannot save it. SDOG's new articles of incorporation were filed on August 17, 2015, ***after*** *inewsource's* anti-SLAPP motion was filed on July 30, 2015. (AA IX 2183-2186; AA VII 1689 – 1690; AA I 72- AA VI 1655.) A non-profit cannot "begin an action ... which it has not included in its articles of incorporation, and be permitted to support the complaint by subsequently amended articles which include this omitted" authority. *Boca & L.R. Co.,* 2 Cal.App. at 556. In fact, SDOG's 11th hour amendment of its articles only serves to underscore that Briggs created SDOG to be his plaintiff in lawsuits he files for profit. (*See* Sections II, D, *supra* and III, E, 4, d, *infra*.)

b. <u>SDOG Lacks Standing To Sue</u>

Associational standing similarly requires that "the interests the association seeks to protect are germane to the organization's purpose."

Amalgamated Transit Union, Local 17 56, AFL-3 CIO v. Superior Court (2009) 46 Cal.4th 993, 1003-1004. Organizations lack standing to sue for claims unrelated to their stated purposes. *E.g., Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture* (9th Cir. 2005) 415 F.3d 1078,1103-1104 (organization representing cattlemen's economic interests lacked standing to assert environmental interests).

Here, SDOG's lawsuit attacking a news partnership is entirely unrelated to its "environmental" purpose. (AA VII 1695-1763; AA IX 2183-2186.) SDOG cannot obtain standing retroactively by either relying on self-serving statements about its "purpose," like the vague phrase of "transparent government activities" in SDOG's mission statement, or its "new" amended articles. (AA IV 967-969; AA V 1153.) *Animal Lovers Volunteer Assn., Inc. v. Weinberger* (9th Cir. 1985) 765 F.2d 937, 939. *Cf. Nat'l Coalition for Students et. al. v. Wilkey* (N.D.N.Y) 2007 WL 951559 at *3-*7[dismissing for lack of standing where nominal plaintiff was alter ego of plaintiff's counsel], Section 4, a, *supra*.)[10] SDOG thus lacks associational standing to sue.[11]

[10] SDOG's reliance on *Gilbane Build. Co. v. Sup. Ct.* (2014) 223 Cal.App.4th 1527 does not change this conclusion. The Court did not address SDOG's articles of incorporation or purpose, and simply held that SDOG proved it had individual members with standing to sue there, unlike

c. This Suit Exceeds SDOG's Authority As A 501(c)(3) Non-Profit

A 501(c)(3) corporation must show that (1) it is organized and will operate exclusively for religious, charitable, scientific, educational, or other tax-exempt purposes, and (2) no part of its earnings will inure to the benefit of a private person. *Am. Campaign Academy v. Comm'r* (1989) 92 T.C. 1053, 1062; 1989 WL 49678. Its activities must further and reasonably relate to its exempt purpose. *Id.*; IRS Rev. Rul. 80-2 8. Substantial private benefit destroys the exemption regardless of an organization's other charitable activities. *Better Bus. Bureau of Wash., D.C. v. U.S.* (1945) 326 U.S. 279, 283.

Here, SDOG exists solely to act as Briggs's plaintiff in lawsuits to earn BLC profits. It has no other activities, lacks any funds of its own, uses BLC to pay its expenses, and uses BLC to directly collect SDOG's fee awards and settlements for BLC's sole benefit, so its real purpose is to employ Briggs and BLC for profit. (*See* Sections II, D, *supra* and III, E, 4,

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here. (AA VII-IX 1671-2186, *passim*; AA IX 2187-2200, *passim*; RJSA I 3-11.)

[11] SDOG contends it has "taxpayer" standing. (AA I 12 [¶15].) SDOG does not allege that it, however, has paid any taxes. In fact, its very purpose as a § 501(c)(3) is to avoid paying taxes. The fact that one of its members had allegedly paid taxes (AA I 2 [¶1]) is irrelevant because, as noted in the main text, it lacks associational standing. It also failed to produce any evidence to prove standing of it or any of its members here.

d., 4, *infra.*) This suit thus falls outside the scope of SDOG's stated nonprofit authority.

d. SDOG Is An Alter Ego Of Briggs And BLC

SDOG argues *inewsource's* alter ego argument is nothing but a "false, ugly, personal attack" on SDOG and Briggs, given that SDOG won a lawsuit invalidating an illegal San Diego tax. (AB, pp. 32-35.) But the *Shapiro* case cited by SDOG did not consider the alter ego issue raised here, and is therefore not authority on this point. *City of San Diego v. Shapiro* (2014) 228 Cal.App.4th 756; *People v. Casper* (2004) 33 Cal.4th 38, 43. If anything, *Shapiro* is but another example of Briggs using SDOG to do his bidding for his profit. (AB, pp. 32; *see* Section III, E, 4, c, *supra*.) SDOG proffers no evidence to disprove that its only activity is to file repeated suits with BLC as its counsel, or that it uses BLC to pay its fees and collect its settlements so it can be kept penniless. (See Section II, D, *supra.*) Simply put, SDOG was created by, and is operated by, BLC solely to be Brigg's plaintiff in lawsuits he files, and both are SDOG's alter ego. (*See* Section II, D, 2, *supra*.)

SDOG next requests that the Court judicially notice Superior Court Judge Wohlfiel's finding an unrelated lawsuit between the City of San Diego and SDOG, that SDOG did not lack "standing to sue because of its alleged status as Briggs's alter ego." (AB, p. 3.) This finding is inadmissible for reasons stated in *inewsource's* opposition to the motion for

judicial notice. (*See* VII-IX 1671-2186, *passim*.) It is also irrelevant. There, SDOG proved it could survive the second prong of the test for standing set forth in *Hunt v. Washington State Apple Advertising Comm'n* (1977) 432 U.S. 333, 344-45, *i.e*., that the lawsuit was germane to SDOG's "environmental" purpose as it concerned the California Environmental Quality Act and "other land-use laws." (Wohlfiel Decision, p. 26; *see also* Section III, E, 4, b, *supra*.) SDOG's Complaint in this case has nothing to do with its "environmental" purpose, and it thus cannot meet the *Hunt* test.

SDOG then argues that, even if Briggs were the alter ego of SDOG, "that merely means that Mr. Briggs could be liable in some way for the actions taken by [SDOG]." (AB, pp. 33-34, citing *Mesler v. Bragg Mgmt. Co.* (1985) 39 Cal.3d 290, 300.) That is precisely what *inewsource* seeks; it seeks to hold Briggs responsible for SDOG's filing of this meritless lawsuit and for statutorily-mandated attorneys' fees and costs. Code Civ. Proc. §425.16, subd. (c).

Alter ego is an equitable doctrine to allow courts to use all means necessary to stop unfairness or fraud, or "some other wrongful or inequitable purpose." *People v. Anderson* (1991) 1 Cal.App.4th 1084, 1092; *NEC Electronics v. Hurt* (1989) 208 Cal. App. 3d 772, 777 (alter ego's basic purpose is "to assure a just and equitable result.") While the evidence in support of this issue is necessarily circumstantial – given Briggs's repeated assertion of the attorney-client privilege in connection

with evidence about SDOG and its operations – this meritless case was not filed in a vacuum.

Notably, direct testimony establishes that service of this lawsuit was made only after months of harassment of *inewsource* by Briggs, his significant other, and SDOG and Briggs's other non-profits, through meritless retraction demands to chill *inewsource's* reporting, and a reporter subpoena withdrawn by Briggs at the 11th hour. (RJSA I 62-63; AA I 233 [¶¶24, 26]; 255 [¶ 6]; AA II 512-548; AA III 550-726, AA II 500-502, 739, AA III 820-831; AA I 225 [¶4].)

Direct evidence also establishes that Briggs controls SDOG's actions and filed all of its lawsuits – that is, up until this one, where, in light of his prior harassment of *inewsource,* and given the anti-SLAPP statute, it was not advantageous for him to be involved. (*See* Sections II, d, *supra*, and III, E, 4, a-c, *supra*.)

But tellingly, even Briggs's "distance" from this lawsuit was not complete, as he was actively baiting the media with it ***before it was even publicly available from the Court or served***, and particularly, with allegations ***concerning a condo that SDOG was forced to admit in this lawsuit had nothing to do with the claims pled***. (AA I 235 [¶26 iv]; AA VI 1660-1663.) Briggs also spitefully told *inewsource* and KPBS not to attend one of his press conference's because of this litigation. (*See* Motion For Judicial Notice, exhibit 2 to declaration of G. Cummins.)

inewsource further produced evidence establishing both that (1) there is such a unity of interest and ownership that the separate personalities of SDOG, Briggs and BLC cease to exist; and (2) it would be inequitable to treat the acts in question as those of only SDOG. *Sonora Diamond Corp. v. Sup. Ct.* (2000) 83 Cal.App.4th 523, 538-39 (relevant alter ego factors include commingling of assets, identical equitable ownership, shared offices and employees, disregard of corporate formalities, shared officers and directors, and use of one as a mere conduit for the other). Some of *inewsource's* most notable evidence includes that:

- SDOG is kept penniless to avoid sanctions and court costs from its lawsuits, despite that it has won hundreds of thousands of dollars in judgments and settlements – all paid directly to BLC. (*See* Section II, D, 2, *supra.* *See*, *e.g.*, *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1123 (intentional undercapitalization evidences alter ego).[12]

- SDOG is operated out of BLC's offices, by BLC personnel, a BLC attorney attends all of its meeting, and even a recent BLC job announcement states a successful applicant would be supervised by BLC attorneys but could be "nominally employed" by a "non-profit" for loan repayment purposes. (AA VI 1425.)

- BLC pays all of SDOG's expenses. (*See* Section II, D, 2, *supra.*)

[12] *See also NEC Electronics, Inc., supra,* 208 Cal.App.3d at 777-778 (manipulation of assets produced inequity and supported alter ego finding); *Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1034 (that corporation "left as a hollow shell without means to satisfy its existing and potential creditors" supported alter ego finding).

- SDOG has only three "appointed" officers, one of whom is Briggs's cousin, and all of whom know very little about SDOG's operations. (*See* Section II, D, 2, *supra.*) And

- SDOG fails to maintain corporate formalities. (*Id.*) *See Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1213, fn. 3.

In light of all of this evidence, *inewsource* seeks to avoid an inequitable result by treating SDOG as what it really is – the alter ego of Briggs and BLC, utilized to assert sham claims in this litigation in furtherance of Briggs's personal vendetta. This is well within the parameters of the alter ego doctrine, and Briggs should be held accountable for SDOG's meritless lawsuit, and the judgment against it, including statutory attorneys' fees. *See* Code Civ. Proc. §425.16, subd. (c); *Wells Fargo Bank v. Weinberg* (2014) 227 Cal.App.4th 1, 8-9 (affirming alter ego finding where attorney failed to separate himself from his law firm); *Say & Say, Inc. v. Ebershoff* (1993) 20 Cal.App.4th 1759, 1761-68 (Although the vexatious litigant rule requires vexatious acts "in propria persona," it was applied an attorney's law firm where it was the attorney's alter ego because he used it to "avoid the effect of a lawsuit.")

IV. CONCLUSION

For the reasons set forth, the Superior Courts' orders should be affirmed.

Respectfully Submitted,

Dated: May 13, 2016

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CERTIFICATE OF WORD COUNT

In compliance with California Rules of Court, rule 8.204(c)(1) or 8.504(d)(1) I, Guylyn R. Cummins, certify that the foregoing brief is produced using 13-point Times New Roman type and contains 13,909 words (including footnotes, but excluding the table of contents, table of authorities, certificate of service, and this certificate of word count), as reported by Microsoft Word 2010, the word processing software used to prepare this brief.

Dated: May 13, 2016

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Court of Appeals, State of California, 4th Appellate District, Division One
San Diegans for Open Government v. San Diego State University, et al.
Appellate Case No. D069189
SDSC Case No. 37-2015-00011951-CU-MC-CTL

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On May 13, 2016, I served true copies of the following document(s) described as:

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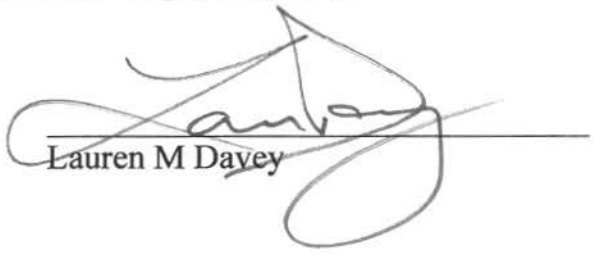
(1 copy – Via E-File/Serve)

☒ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☒ **BY ELECTRONIC SERVICE:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling), I provided the document(s) listed above electronically on the TRUE FILING Website to the parties on the Service List maintained on the TRUE FILING Website for this case, or on the attached Service List. TRUE FILING is the on-line e-service provider designated in this case. Participants in the case who are not registered TRUE FILING users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 13, 2016, at San Diego, California.



Lauren M Davey